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No. 07-460

In the Supreme Court of the United States

CHRISTINE WELLS GROFF AND MICHAEL WELLS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Bureau of Justice Assistance's determination that the employee of an independent contractor was not "serving a public agency in an official capacity" within the meaning of the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. 3796 *et seq.*, when he died performing the work required by his employer's government contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 493 F.3d 1343. The opinion of the United States Court of Federal Claims (Pet. App. 24a-78a) is reported at 72 Fed. Cl. 68.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2007. The petition for a writ of certiorari was filed on October 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Public Safety Officers' Benefits Act of 1976 (PSOBA or Act), 42 U.S.C. 3796 *et seq.*, provides for the payment of a one-time, lump-sum benefit of $250,000

"[i]n any case in which the Bureau of Justice Assistance * * * determines, under regulations issued pursuant to [the Act], that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty." 42 U.S.C. 3796(a) (Supp. IV 2004). The PSOBA defines "public safety officer" as "an individual serving a public agency in an official capacity, with or without compensation, * * * as a firefighter." 42 U.S.C. 3796b(7)(A) (2000); 42 U.S.C. 3796b(8)(A) (Supp. IV 2004); Act of Jan. 5, 2006, Pub. L. No. 109-162, § 1164(a)(1), 119 Stat. 3120 (to be codified at 42 U.S.C. 3796b(9)(A) (2006)); accord 28 C.F.R. 32.2(j) (2001); cf. 28 C.F.R. 32.3 (2006) (defining "in an official capacity," effective September 11, 2006).

In the PSOBA Congress delegated authority to the Bureau of Justice Assistance (BJA) "to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of" the Act. 42 U.S.C. 3796c(a). Pursuant to that statutory authority, the BJA has promulgated regulations establishing a process for reviewing benefits claims that includes a hearing before a hearing officer and a final determination by the Director of the BJA. See 28 C.F.R. 32.23-32.24 (2001) (current version at 28 C.F.R. 32.41-32.55); Pet. App. 8a-10a. In determining whether a public safety officer is entitled to a benefit, the BJA gives "substantial weight to the evidence and findings of fact presented by State, local, and Federal administrative and investigative agencies." 28 C.F.R. 32.5 (2001).

2. In 1995, San Joaquin Helicopters (SJH), a private company based in California, entered into a contract with the California Department of Forestry and Fire Protection (CDF) to provide piloting services for fire suppression missions. Pet. App. 4a, 94a. The contract

stated that SJH employees "shall act in an independent capacity and not as officers or employees or agents of the State of California." *Id.* at 94a. The contract also established that SJH would indemnify the State and maintain liability insurance for activities performed under the contract. *Id.* at 94a-95a. Additionally, SJH held sole authority to set the terms and conditions of employment for the pilots who performed services under the contract. *Id.* at 93a. A CDF aviation procedures handbook provided that "[c]ontractors * * * must understand that they are acting in an independent capacity in the performance of their service, and not as an officer, employee or agent of the state." *Id.* at 94a.

Beginning in 1997, Lawrence Groff was employed by SJH as an aircraft pilot. Pet. App. 4a, 93a. On August 27, 2001, an air-tanker that Groff was piloting on a fire-suppression mission pursuant to the contract with the CDF collided with another aircraft. *Id.* at 4a, 90a. Groff died as a result of injuries he sustained in the collision. *Id.* at 4a, 90a.

3. On August 21, 2002, petitioners—Groff's widow and stepson—filed a claim for death benefits pursuant to the PSOBA. Pet. App. 4a, 25a, 90a. On October 31, 2002, the BJA issued an initial determination denying the claim. *Id.* at 79a-80a, 87a-88a. The BJA explained that "[t]he death of a privately-employed worker who has been contracted by a public agency is not covered by the PSOB Act." *Id.* at 88a. In support of that proposition, the BJA cited *Holstine* v. *Department of Justice LEAA* (DOJ July 8, 1980), *in* Office of General Counsel, U.S. Dep't of Justice, *Legal Interpretations of the Public Safety Officers' Benefits Act* (*Legal Interpretations*) 7 (Nov. 1981), aff'd, 688 F.2d 846 (9th Cir. 1982) (Table), in which the BJA's predecessor agency decided

on highly analogous facts that the death of a pilot employed by a contractor to a public agency did not give rise to benefits under the Act. Pet. App. 88a. Petitioners appealed the initial denial of benefits to a BJA hearing officer. *Id.* at 79a.

After the BJA hearing officer made several offers during 2003 to arrange a formal hearing, petitioners elected to submit evidence and arguments by mail in January 2004. Pet. App. 79a-80a. Petitioners' primary evidence consisted of two letters written after Groff's death by a CDF official describing Groff's relationship to the state agency. *Id.* at 58a-60a. The letters noted that Groff was "authorized and required" to operate state firefighting aircraft and "to take immediate and independent action to suppress" fires. *Id.* at 59a. The letters also stated that the State of California and United States were the beneficiaries of Groff's services; that he operated a state aircraft at the direction of CDF dispatchers; that he received food, lodging, and flight gear from the CDF; that he "was the final authority and responsible for the safe operation" of the state aircraft; that he "had the authority, as a State firefighter pilot under the Federal Aviation Regulations, to close airspace to civil aircraft, to get priority handling from the Federal Aviation Administration on airspace use"; and that his death has been recognized on state and national firefighter memorials. *Id.* at 82a-83a.

On February 20, 2004, the hearing officer sustained the BJA's denial of benefits. The officer concluded that Groff was not a "public safety officer serving a public agency in an official capacity" under the Act because the contract between SJH and the CDF made clear that "Groff was serving as an employee of a private em-

ployer." Pet. App. 85a-86a. Petitioners appealed the hearing officer's determination to the BJA Director.

On July 20, 2005, the BJA Director issued the agency's final decision denying the claim. Pet. App. 90a-118a. The Director relied in part on the *Holstine* decision, which the BJA's predecessor agency had reported as official guidance in a publication, see *Legal Interpretations* 7, and to which the Federal Circuit deferred in *Chacon* v. *United States*, 48 F.3d 508 (1995). Pet. App. 96a-99a. The Director interpreted the Act's requirement that an individual "serv[e] a public agency in an official capacity" to mean that "the individual must be 'an officer, employee, volunteer or [be in a] similar relationship of performing services as part of a public agency'" and "be officially recognized or designated as functionally within or part of the public agency." *Id.* at 98a (quoting *Legal Interpretations* 9).

After thoroughly examining both the evidence that petitioners submitted and also evidence that the Director subpoenaed from SJH, see Pet. App. 92a, the Director concluded that "Groff was not functionally within or a part of the CDF; he ultimately served under the direction of his private-sector employer," *id.* at 99a. The Director based that conclusion on, *inter alia*, the SJH–CDF contract's statement that SJH employees acted "in an independent capacity and not as officers or employees or agents of the State"; SJH's agreement to hold the State harmless for services rendered; SJH's superior control over Groff and sole authority to set the terms and conditions of his employment; SJH's obligation to pay Groff's compensation and benefits; SJH's obligation to carry liability insurance to cover third-party claims; and SJH's agreement to pay penalties incurred with respect to pilots' unsatisfactory or nonperformance of

services. *Id.* at 101a-102a. The Director construed the requirements that CDF placed on pilots as permitting CDF to obtain predictable, safe, and effective services, but not as creating "State supervision of day-to-day operations of the contractor, so as to confer agency status or authorize the decedent to serve the CDF in an official capacity." *Id.* at 101a.

4. Petitioners subsequently filed a complaint in the Court of Federal Claims (CFC) seeking review of the agency's final decision. The CFC possesses jurisdiction to review BJA decisions to determine (1) whether there has been substantial compliance with statutory requirements and provisions of implementing regulations; (2) whether there has been any arbitrary or capricious action by government officials involved; and (3) whether substantial evidence supports the decision. *Chacon*, 48 F.3d at 511-512.

The CFC set aside the BJA's determination and awarded benefits. Pet. App. 24a-78a. The court accepted the BJA's interpretation that "[i]n order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or [in a] similar relationship" and "must be officially recognized or designated as functionally within or a part of the public agency." *Id.* at 30a (quoting *Legal Interpretations* 9); see *id.* at 39a. The CFC declined to defer, however, to the BJA's conclusion that privately employed firefighters fell outside that definition because, in the court's view, that conclusion was not supported by "the PSOBA's remedial purpose and legislative history." *Id.* at 51a. The CFC relied primarily on the two CDF letters to hold that "Groff was fully integrated into the CDF and was performing services as a part of the CDF much like a CDF employee." *Id.* at 61a. The court granted judg-

ment in favor of petitioners in the amount of $250,000, adjusted in accordance with 42 U.S.C. 3796(h) (Supp. IV 2004). Pet. App. 71a.

5. The court of appeals reversed. Pet. App. 1a-23a. The court first reaffirmed its precedents holding "that Congress intended for the BJA's statutory interpretations announced through adjudication to have the force of law, and that those interpretations are therefore entitled to deference under [*Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*)]." Pet. App. 13a; see *id.* at 13a-16a (citing *Amber-Messick* v. *United States*, 483 F.3d 1316, 1323 (Fed. Cir.), cert. denied, 128 S. Ct. 648 (2007); *Chacon*, 48 F.3d at 512).

The court of appeals then applied the two-step *Chevron* inquiry to sustain the BJA's conclusion that Groff was not a "public safety officer" under the Act. Pet. App. 16a-19a. The court held that the statute was "silent" as to "[t]he precise issue in this case," which "is whether the term 'public safety officer' as used in the statute includes privately employed pilots * * * who render fire suppression assistance pursuant to contracts between their employers and pubic agencies." *Id.* at 16a-17a. Proceeding to *Chevron*'s second step, the court affirmed the BJA's construction because it is reasonable "to conclude that Congress intended for the phrase 'in an official capacity' to capture" volunteer and public firefighters "while excluding privately employed individuals," and because the Act's legislative history was compatible with the BJA's construction. *Id.* at 18a-19a.

The court of appeals also rejected petitioners' contention that the BJA misapplied its own interpretation because Groff was "officially recognized or designated as functionally within or a part of" the CDF. Pet. App. 19a-20a. The court deferred to the BJA's contrary as-

sessment of the contractual arrangement between SJH and the CDF. *Ibid.*

ARGUMENT

The court of appeals properly applied well-established principles of *Chevron* deference to conclude that the BJA's interpretation of "public safety officer" for purposes of the PSOBA is permissible and entitled to deference. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. In addition, petitioners' argument reduces to a disagreement with the BJA's assessment of the factbound details of Groff's particular relationship with the state agency. For those reasons, further review is unwarranted.

1. The court of appeals correctly applied settled principles of *Chevron* deference to sustain the BJA's conclusion that employees of a private company contracting with the government do not "serv[e] a public agency in an official capacity" within the meaning of the PSOBA.

a. An agency's legal interpretation is eligible for *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The legal interpretation at issue in this case satisfies those conditions because the BJA possesses congressionally delegated authority to adjudicate claims and promulgate rules with legal force, see 42 U.S.C. 3796c(a), and issued the interpretation through a "relatively formal adjudicative procedure," *Mead*, 533 U.S. at 230. Those procedures included the right to a full evidentiary hearing before a hearing ex-

aminer, who made written findings of fact and conclusions of law, as well as plenary review by the head of the agency, who issued a final written decision. 28 C.F.R. 32.23-32.24 (2001). The CFC reviews the BJA's decision deferentially based on the agency record, see *Yanco* v. *United States*, 258 F.3d 1356, 1362, 1365 (Fed. Cir. 2001), cert. denied, 534 U.S. 1114 (2002), and the BJA treats at least some of its final decisions as precedents for future cases, see *Chacon* v. *United States*, 48 F.3d 508, 512 (Fed. Cir. 1995). Under this Court's precedents, those factors confirm the legal force of an agency's interpretations and, concomitantly, the applicability of *Chevron*'s framework. See, *e.g.*, *Mead*, 533 U.S. at 232-233 & n.16.

Contrary to petitioners' assertion (Pet. 24), the BJA's decision is not ineligible for *Chevron* deference merely because it was not issued in a regulation. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (granting *Chevron* deference to determinations made through adjudication by Board of Immigration Appeals). Nor does the BJA's choice to determine claim eligibility through adjudication rather than rulemaking render the interpretation "beyond the mandate issued by Congress," as petitioner contends (Pet. 24). Congress has authorized the BJA to establish "rules" or "procedures" to enforce the Act, see 42 U.S.C. 3796c(a), and the choice of enforcement mode lies within the BJA's discretion. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). It is therefore unsurprising that the Federal Circuit has long applied *Chevron* analysis to legal interpretations that the BJA renders through adjudication. *Amber-Messick* v. *United States*, 483 F.3d 1316, 1323 (Fed. Cir.), cert. denied, 128 S. Ct. 648 (2007); *Chacon*, 48 F.3d at 511-512.

Petitioners also err in arguing (Pet. 17-19, 23-25) that the BJA's decision is not eligible for *Chevron* deference because it relied on the *Holstine* decision as reported in the *Legal Interpretations*. Assuming *arguendo* that the *Legal Interpretations* would not, standing alone, command *Chevron* deference, that fact would "not automatically deprive that interpretation of the judicial deference" it now merits. *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002). To the contrary, the fact that the BJA has long construed the Act in a consistent manner supports the conclusion "that *Chevron* provides the appropriate legal lens" through which to view the BJA's interpretation. *Id.* at 222.

Petitioners attempt to limit the applicability of *Chevron* deference (Pet. 23-25) by distinguishing between, on one hand, the BJA's "definition" of who "serv[es] a public agency in an official capacity," and, on the other, the BJA's legal conclusion that a privately employed firefighter does not fall within the "definition." That distinction does not withstand scrutiny. The BJA's legal conclusion constitutes an interpretation of the statute, made through an exercise of the agency's congressionally delegated authority, just as much as the so-called "definition"; *Chevron*'s framework therefore applies to both. Cf. *Aguirre-Aguirre*, 526 U.S. at 429-430 (deferring under *Chevron* to Bureau of Immigration Appeals' ultimate conclusion that respondent had committed a serious nonpolitical crime). As the court of appeals explained, the BJA's "definition" "was an explicit restatement" of the agency's primary conclusion that "privately employed contract pilots did not serve public agencies in an official capacity." Pet. App. 21a (internal quotation marks omitted). Thus, the BJA's decision presents a

single legal conclusion, which the court of appeals correctly held was *Chevron*-eligible.

b. Petitioners do not seriously dispute the court of appeals' holding that the Act is "silent" as to "whether the term 'public safety officer' as used in the statute includes privately employed pilots * * * who render fire suppression assistance pursuant to contracts between their employers and pubic agencies." Pet. App. 16a-17a. Although petitioners assert (Pet. 28-29) that the "common sense" reading of the Act covers a privately employed firefighter, the phrase "in an official capacity" limits the clause "serving a public agency" and suggests that only persons in an official *public* position are covered by the Act. The BJA's view that persons employed by a *private* employer are not covered is therefore a persuasive reading of the Act. At most, petitioners' construction of the statute (Pet. 28-29) demonstrates only that the phrase "serving a public agency in an official capacity" is ambiguous with respect to the question at hand. Accordingly, the court of appeals properly proceeded to *Chevron*'s deferential second step.

c. The court of appeals correctly decided that the BJA's legal conclusion reflects a permissible construction of the PSOBA and is therefore deserving of deference. In addition to its consonance with the text, purpose, and legislative history of the statute, the BJA's interpretation also deserves deference because it has been consistently applied since 1980. See *Barnhart*, 535 U.S. at 220 ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration.") (quoting *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522 n.12 (1982)).

Petitioners contend (Pet. 11-13) that BJA's interpretation is impermissible in light of the Act's purposes of encouraging and recognizing public service and alleviating burdens placed on public servants and their families. But "no legislation pursues its purposes at all costs," *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam), and petitioners' general statements of legislative purpose therefore shed little if any light on the question of precisely whose death gives rise to a death benefit. Moreover, petitioners' contention disregards the fact that the Act provides "a limited program" that balances "compensating for inadequate state and local death benefits" with federal budgetary constraints and concerns that "federal assumption of full responsibility for compensating the families of deceased officers" would "allow states and municipalities to evade their responsibilities." *Russell* v. *LEAA*, 637 F.2d 1255, 1261 (9th Cir. 1980). That the Act confers death benefits in order to supplement payments by States and municipalities indicates that the Act does not cover privately employed individuals whose death benefits typically are paid by their private employers.

Nor does the PSOBA's legislative history contradict the BJA's interpretation. In protracted discussions of the Act's history, neither petitioners (Pet. 29-33) nor the CFC (Pet. App. 41a-51a) identify any evidence that affirmatively supports their contention that Congress meant to provide benefits for employees of private companies. The only legislative history that specifically addresses whether the Act covers private-sector employees, a floor exchange between the PSOBA's House sponsor and another Representative, points in the opposite direction. See 122 Cong. Rec. 12,009 (1976) (statements of Rep. Myers and Rep. Eilberg) (Rep. Myers: "[I]s there any

way in which this bill would apply to privately employed safety or security officers?" Rep. Eilberg: "No, it would not."); Pet. App. 111a. Like petitioners' summary of the Act's purposes, petitioners' summary (Pet. 32) of the legislative history as revealing a "generous impulse and broadening application of the PSOBA" is too generalized to bear on the question at hand, let alone to show that the BJA's conclusion is unreasonable.

Also demonstrating the permissibility of the BJA's interpretation is the current version of the PSOBA's implementing regulations. The current regulations, which the BJA promulgated in August 2006 after notice and comment, codify the BJA's longstanding view that privately employed firefighters such as Groff do not "serv[e] a public agency in an official capacity." See 28 C.F.R. 32.3.* Although the government did not rely on the current regulations as the basis for defending the BJA's decision before the lower courts, Pet. App. 22a-23a n.2, this Court has given deference to an "agency's current authoritative pronouncement of what the statute means." *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 744 n.3 (1996); see *United States* v. *Morton*, 467 U.S. 822, 835-836 n.21 (1984) (deferring to regulation promulgated after suit was initiated because suit raised issue for which Congress delegated authority to agency to ad-

* The current regulations state: "An individual serves a public agency in an official capacity only if (1) He is officially authorized, recognized, or designated (by such agency) as functionally within or part of it; and (2) His acts and omissions, while so serving, are legally those of such agency, which legally recognizes them as such (or, at a minimum, does not deny (or has not denied) them to be such)." 28 C.F.R. 32.3. That standard excludes Groff because the CDF's contract with SJH stated that Groff was not part of the agency, but instead "act[ed] in an independent capacity," and because his acts and omissions were not legally those of the CDF. Pet. App. 94a.

dress). In sum, because the court of appeals applied settled precedent to defer to the BJA's permissible interpretation, further review is unnecessary.

2. At bottom, petitioners accept the BJA's view that persons serving as employees of a private contractor rather than as part of a public agency are not covered by the Act. See Pet. 21 (defending the BJA's "definition" of "serving * * * in an official capacity"); Pet. 24 (same); Pet. 33-34 (same). Their argument therefore reduces to a disagreement with the BJA's characterization of the particular relationships between Groff, SJH, and the CDF. That factbound argument does not merit this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, the record contains substantial evidence that Groff was not serving the CDF in an official capacity. The contract between SJH and the State provided that SJH employees "shall act in an independent capacity and not as officers * * * or agents of the State of California." Pet. App. 94a. The CDF's aviation handbook confirmed Groff's "independent capacity" status, providing that "[c]ontractors must understand that they are acting in an independent capacity in the performance of their service, and not as an officer * * * or agent of the state." *Id.* at 4a. SJH agreed to hold the State harmless for any actions of Groff. *Id.* at 94a. Similarly, SJH, not its employees, were liable to the CDF for financial penalties and the training costs related to pilots whose qualifications or performance fell below specified standards. *Id.* at 95a. Sole authority to determine the terms and conditions of Groff's employment, such as compensation, hours and schedule, work assign-

ments, and job responsibilities, rested with SJH, not the CDF. *Id.* at 93a. Thus, while the State and the public benefitted from Groff's piloting activities, abundant evidence supports the BJA's conclusion that he served as part of SJH.

Finally, petitioners are mistaken in contending (Pet. 27) that the BJA violated its obligation under 28 C.F.R. 32.5 to give substantial weight to the factual findings of the CDF. The BJA acknowledged and did not dispute the CDF's factual findings that were presented by petitioners. See Pet. App. 101a. The BJA simply disagreed with the legal conclusion that petitioners urged on the basis of those facts. "Although the Bureau could give the [CDF's] legal conclusion whatever weight, if any, it deemed appropriate, it was not required to give it any weight." *Demutiis* v. *United States*, 291 F.3d 1373, 1379 (Fed. Cir. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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